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# COMMUNITY INSTITUTION BUILDING: A RESPONSE TO THE LIMITS OF LITIGATION IN ADDRESSING THE PROBLEM OF HOMELESSNESS

RONALD C. SLYE\*

## I. INTRODUCTION

In the more than ten years since the problem of homelessness became a cause célèbre in the United States, we have made little progress in addressing and curtailing this extreme manifestation of poverty.<sup>1</sup> Within the legal profession, both public interest and private pro bono attorneys have chosen to approach the problem of homelessness primarily through the courts. Those attorneys have brought lawsuits attempting to improve living conditions in temporary shelters,<sup>2</sup> to protect the civil rights of the homeless,<sup>3</sup> and to establish some form of "right to housing."<sup>4</sup>

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\* Berle, Kass & Case, New York, NY. As a law student, I helped to start the Workshop on Shelter for the Homeless at Yale Law School, and taught the Workshop class at Yale for two years. I want to thank Ron Apter for many helpful suggestions on an earlier draft of this article, and Rebecca Arbogast, Roger Barnett, and Kim Treiger for early discussions on the uses of community institution building to address the problem of homelessness.

1. See, e.g., Finder, *Homelessness in New York: Years of Plans, No Solution*, N.Y. Times, Dec. 30, 1990, § 1, col. 4 (recession in region limits city's efforts to provide solutions for homelessness).

2. See, e.g., *McCain v. Koch*, 70 N.Y.2d 109, 511 N.E.2d 62, 517 N.Y.S.2d 918 (1987) (establishing minimum standards of decency for shelters housing families with children), *on remand*, 136 A.D.2d 473, 523 N.Y.S.2d 112 (1988); *Barnes v. Koch*, 136 Misc. 2d 96, 518 N.Y.S.2d 539 (N.Y. Sup. Ct. 1987) (directing city to implement maintenance and inspection plan for shelter with lead paint to prevent significant health hazards); *Callahan v. Carey*, No. 42582/79 (N.Y. Sup. Ct. Dec. 5, 1979) (establishing standards for shelters housing single men), *reprinted in* N.Y.L.J., Dec. 11, 1979, at 10, col. 4.

3. See, e.g., *Young v. New York City Transit Auth.*, 903 F.2d 146 (2d Cir.), *rev'g*, 729 F. Supp. 341 (S.D.N.Y.), *cert. denied*, 111 S. Ct. 516 (1990) (regulation prohibiting begging and panhandling in subway did not violate beggar's first amendment rights).

4. Advocates have used a number of strategies to try to establish a right to housing. Some have focused on entitlement benefit levels. See, e.g., *Jiggets v. Grinker*, 75 N.Y.2d 411, 553 N.E.2d 570, 574 N.Y.S.2d 92 (1990) (arguing federal Aid to Families with Dependent Children (AFDC) shelter allowances were inadequate to meet housing needs as required by state statute); *Massachusetts Coalition for the Homeless v. Secretary of Human Resources*, 400 Mass. 806, 511 N.E.2d 603 (1987) (arguing state has statutory obligation to provide aid sufficient to allow AFDC recipients to live in "home" and not simply to provide "accommodations"). Some cases have focused on time limits that have been placed on the provision of emergency shelter. See, e.g., *Franklin v. Department of Human Servs.*, 225 N.J. Super. 504, 543 A.2d 56 (App. Div.) (challenging 5

While some of these lawsuits have been successful, and while some of the successful suits have resulted in short-term benefits for the homeless—or at least to the individual plaintiffs—few have successfully addressed any of the long-term structural problems that have led to the problem of homelessness.

This article draws upon the experiences of the Jerome N. Frank Legal Services Organization at Yale Law School to argue that, while litigation has a place in addressing both the problem of homelessness and the problems of the homeless, it must be placed within a broader context and supplemented by other, non-litigious, legal activity. Using as an example a lawsuit brought on behalf of homeless families in Connecticut, this article makes four observations which support the conclusion that litigation, used alone, is an ineffective means of addressing the problem of homelessness.

First, within the last decade, judicial sympathy for poverty law cases has decreased, especially at the federal level. This decreased sympathy at the federal level has placed more responsibility on state courts and legislatures which has resulted in a lack of consistency in how we, as a nation, treat the poorest among us.<sup>5</sup> Second, even with sympathetic judges, litigation is limited by the legal framework within which it operates; as interpreted by the courts, the United States Constitution provides little in the way of direct protection for victims of poverty.<sup>6</sup> Third, because of its

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month limit for emergency shelter benefit), *aff'd per curiam*, 111 N.J. 1, 543 A.2d 1 (1988); *Maticka v. City of Atlantic City*, 216 N.J. Super. 434, 524 A.2d 416 (App. Div. 1987) (challenging state regulation limiting provision of emergency shelter to 90 days). Other cases have focused on child welfare laws. *See, e.g.*, *Hansen v. Department of Social Servs.*, 193 Cal. App. 3d 283, 238 Cal. Rptr. 232 (1987) (challenging rule limiting shelter services to children who had been removed from their homes); *Martin A. v. Gross*, 153 A.D.2d 812, 546 N.Y.S.2d 75 (1989) (recognizing that city should develop comprehensive plan to provide preventive homeless services to families with children determined to be at risk for foster care), *appeal dismissed sub nom.* *Consentino v. Pareles*, 75 N.Y.2d 808, 551 N.E.2d 603, 552 N.Y.S.2d 110 (1990). For a general discussion of the use of child welfare laws to address the problem of homelessness, see Bussiere, *Advocates for Homeless Families Look to Child Welfare System*, *Youth L. News*, Sept.-Oct. 1989, at 1.

For a comprehensive discussion of efforts to establish a right to housing, see Roisman, *Establishing a Right to Housing: An Advocate's Guide* (pts. I-III), 20 HOUSING L. BULL. 39 (1990) (discussing state and local laws creating a right to shelter), 20 HOUSING L. BULL. 65 (1990) (discussing litigation involving AFDC programs), 20 HOUSING L. BULL. 107 (1990) (discussing expansion of right to housing through child welfare and foster care statutes).

5. For a discussion of the consequences of the lack of judicial sympathy for poverty law cases, see *infra* notes 24-34 and accompanying text.

6. For a discussion of the limitations placed on litigation by judicial inter-

structure, litigation is a poor tool for addressing broad and complex social problems that require long-term structural solutions.<sup>7</sup> Fourth, litigation occurs within a particular political, economic and social context, and any evaluation of it must take this context into account.<sup>8</sup> Finally, this article describes a non-litigious legal strategy, called Community Institution Building, that may be more effective in addressing not only the problem of homelessness in general, but also some of the day-to-day problems facing many homeless individuals.<sup>9</sup>

## II. *SAVAGE V. ARONSON*: AN EXAMPLE OF HOMELESSNESS LITIGATION

On April 10, 1989, the State of Connecticut was on the verge of terminating the emergency shelter benefits provided in Connecticut under the federal Aid to Families with Dependent Children (AFDC) program. At the time, 136 families were receiving such AFDC benefits. These families were being housed in cramped and inadequate motel rooms that cost the State almost \$70 a night, or about \$2,000 a month.<sup>10</sup> Under the Connecticut program guidelines, the families were entitled to this "emergency housing" benefit for only 100 days each year.<sup>11</sup> If the family had not located an alternative living arrangement prior to the expiration of the 100-day limit, their emergency housing assistance would be terminated.<sup>12</sup>

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pretations of the United States Constitution, see *infra* notes 35-58 and accompanying text.

7. For a discussion of the reasons why litigation is a poor tool for addressing broad and complex social problems, see *infra* notes 59-92 and accompanying text.

8. For a discussion of the importance of taking into account the political, economic and social context of litigation, see *infra* notes 93-97 and accompanying text.

9. For a discussion of Community Institution Building, see *infra* notes 97-109 and accompanying text.

10. *Savage v. Aronson*, No. CV-NH 8904-3142, slip op. at 14 (Conn. Super. Ct. Sept. 20, 1989), *rev'd*, 214 Conn. 256, 571 A.2d 696 (1990); *Savage v. Aronson*, 214 Conn. at 290, 571 A.2d at 714 (Glass, J., dissenting).

11. See Connecticut State Plan for Aid to Families with Dependent Children (Attachment 2.3A, at 7(b)); DEPARTMENT OF INCOME MAINTENANCE, UNIFORM POLICY MANUAL § 4515.05, at 2 (describing standards for eligibility and limitations on emergency housing); *Savage v. Aronson*, 214 Conn. at 259, 571 A.2d at 699. AFDC benefits include payments for "food, shelter, and other necessities." Grants are distributed according to "standards of need" as defined by state statutes. Additional benefits are available in "emergency" situations. The cost of the AFDC program is borne equally by the state and federal governments. *Id.*

12. At trial, the plaintiff homeless families testified that after the 100-day period, the amount of assistance they received from both the state and federal

The Yale Legal Services Organization filed suit on behalf of these families against the Connecticut Department of Income Maintenance to enjoin the state from terminating these benefits after 100 days.<sup>13</sup> The suit was based on language in the state's AFDC enabling statute requiring that each dependent child aided under the program "be supported in a home . . . suitable for his upbringing."<sup>14</sup> The plaintiffs argued that this language required the state to provide an "adequate home" for these children, and claimed that the 100-day limit on emergency housing not only failed to satisfy this statutory requirement,<sup>15</sup> but also violated provisions of the state and federal constitutions.<sup>16</sup> The plaintiffs were thus arguing that the court should recognize a "right to shelter," or, to borrow the language of the statute, a "right to a home," for AFDC families in Connecticut.

It might not be readily apparent why the plaintiffs sought to require the state to continue providing shelter through an expensive and inadequate motel system. Interviews with class members for this and other homelessness suits revealed horror stories of the living conditions prevailing in these motels. Nevertheless, the plaintiffs—with their attorneys—were suing to keep themselves and others like them in the motels, an arrangement that most of the parties, including the plaintiffs themselves, recognized as inadequate. To understand the motives of the plaintiffs and their

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government was not enough to cover their housing needs. Also, they explained that while some of the plaintiffs had been offered governmentally subsidized units, these units were "already rented, uninhabitable or boarded up." *Savage v. Aronson*, 214 Conn. at 259, 281-83, 571 A.2d at 699, 701-11. Furthermore, although the Commissioner of Income Maintenance argued that the state's policy was "to offer shelter to any family that needed it" the trial court found the type of shelter usually offered—at times a great distance from the children's schools—was inadequate and disruptive to the family. *Id.* at 283-84, 571 A.2d at 710-11.

13. *Savage v. Aronson*, No. CV-NH 8904-3142 (Conn. Super. Ct. Sept. 20, 1989), *rev'd*, 214 Conn. 256, 571 A.2d 696 (1990).

14. CONN. GEN. STAT. § 17-85(a) (1988).

15. See Memorandum in Support of Plaintiffs' Application for Temporary Injunction at 5-9, *Savage v. Aronson*, No. CV-NH 8904-3142 (Conn. Super. Ct. Sept. 20, 1989), *rev'd*, 214 Conn. 256, 571 A.2d 696 (1990) (asserting that because state regulations provide no exceptions to 100-day limit on emergency housing, plaintiffs would almost certainly become homeless if 100-day emergency housing limit was upheld).

16. Plaintiffs claimed a violation of the third, ninth, and fourteenth amendments of the United States Constitution; and Article 1, §§ 1 and 20 and Article 8, §§ 1 and 4 of the Connecticut Constitution. *Savage v. Aronson*, No. CV-NH 8904-3142, slip op. at 2 (Conn. Super. Ct. Sept. 20, 1989), *rev'd*, 214 Conn. 256, 571 A.2d 696 (1990).

attorneys, however, one must look beyond the judicial record of the case.

For over a year prior to the filing of the lawsuit, the Yale Legal Services Organization and members of the plaintiff class had negotiated with the state legislature to replace the expensive and inadequate motel system with a program that would make more permanent housing available and affordable to the plaintiffs. The argument presented was a simple one. Instead of spending over \$2,000 per month to create conditions that did nothing to help the homeless, and in many cases perpetuated the inability of homeless individuals to reach any level of stability and self-sufficiency, why not spend \$300 to \$600 a month in the form of a rent supplement that would allow these families to afford adequate and permanent apartments?<sup>17</sup> For a variety of reasons, however, the Connecticut legislature was not receptive to this proposal.

In the face of increasing numbers of families being placed in the motels, and thus an increasing number of people who were in danger of becoming permanently homeless, the above lawsuit, *Savage v. Aronson*,<sup>18</sup> was born. A primary purpose of the suit was to highlight the inherent bankruptcy of existing homelessness policy, with the (perhaps naive) hope that the state, realizing its mistake, would adopt a more productive program for addressing the needs of the homeless.

The trial court enjoined the state from evicting the families and declared that the 100-day limit violated state public assistance statutes as well as the state and federal constitutions.<sup>19</sup> On appeal, the Connecticut Supreme Court overturned the ruling and upheld the 100-day limit.<sup>20</sup> Ironically, immediately after the decision was overturned, the state administrators breathed a collective sigh of relief and announced that now that they were free of the lawsuit they could focus state money on more economical and

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17. For a comparative analysis of costs of shelters versus rental assistance in Connecticut, see THE YALE SHELTER PROJECT, *THE BROKEN PROMISE OF WELFARE MOTELS: A REPORT ON THE FISCAL COST OF CONNECTICUT'S EMERGENCY HOUSING PROGRAM* (1990) (on file with author). For a similar analysis in the New York context, see V. BACH & R. STEINHAGEN, *ALTERNATIVES TO THE WELFARE HOTEL: USING EMERGENCY ASSISTANCE TO PROVIDE DECENT TRANSITIONAL HOUSING FOR HOMELESS FAMILIES* (Community Service Society of New York, 1987).

18. No. CV-NH 8904-3142 (Conn. Super. Ct. Sept. 20, 1989), *rev'd*, 214 Conn. 256, 571 A.2d 696 (1990).

19. *Savage v. Aronson*, No. CV-NH 8904-3142, slip op. at 37-38 (Conn. Super. Ct. Sept. 20, 1989), *rev'd*, 214 Conn. 256, 571 A.2d 696 (1990).

20. *Savage v. Aronson*, 214 Conn. at 286-87, 571 A.2d at 712-13.

efficient programs than the welfare motels.<sup>21</sup> Subsequently, the state increased funding for its rental assistance program.<sup>22</sup>

### III. SPECIFIC LIMITATIONS OF LITIGATION

#### A. *Lack of Federal Judicial Sympathy and Consequent Inequality in State Welfare Policies*

My first observation based on the experience of *Savage v. Aronson* is a relatively simple one. Federal courts have always been hesitant to give broad relief to the poor, but today, as a result of more than ten years of federal judicial appointments by conservative Republican administrations, particularly the Reagan administration,<sup>23</sup> the federal courts have become even more reluctant to expand upon the rights of the poor, the disenfranchised, and the homeless. Due to this reluctance, public interest lawyers have begun to rely more heavily on state statutes and constitutions, and they have begun to bring more of their cases in state courts, where judges are generally more sympathetic than their federal counterparts to the rights of the poor.<sup>24</sup> Consequently, our country is becoming less uniform in its treatment of the least fortunate among us.<sup>25</sup>

For example, some states like Texas, Mississippi, and Alabama do not have a general assistance program to help poor sin-

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21. See Aronson, *Enlightened Policy Can Solve Emergency Housing Program*, New Haven Register, Mar. 21, 1990, at 11, col. 2 (Connecticut Welfare Commissioner's proposals for homelessness policy expanded beyond welfare motels); Hathaway, *State Can Limit Motel Stays*, Hartford Courant, Mar. 20, 1990, at A1, col. 3; A4, col. 6 (in response to cost of welfare motels, legislators are studying more efficient ways to prevent homelessness).

22. The legislature authorized the transfer of money from the budget of the Department of Income Maintenance, which oversees and funds the emergency housing program, to the Department of Human Resources, which oversees and funds the rental assistance program. Special Act approved May 18, 1990, § 17, 1990 Conn. Acts 90-18 (Spec. Sess.) 41 (authorizing transfer of up to \$5,000,000 "for the purpose of avoiding emergency housing expenditures on behalf of recipients of aid to families with dependent children").

23. By the end of his two terms, President Reagan had appointed four Supreme Court justices and close to one-half of the 743 federal judges. N. ARON, *LIBERTY AND JUSTICE FOR ALL: PUBLIC INTEREST LAW IN THE 1980S AND BEYOND* 18 (1988).

24. See, e.g., London, *Gay Groups Turn to State Courts to Win Rights*, N.Y. Times, Dec. 21, 1990, at B6, col. 3 (state courts replacing federal courts as defenders of individual rights).

25. See, e.g., Roisman, *Establishing a Right to Housing: An Advocate's Guide*, 20 HOUSING L. BULL. 39, 42-47 (1990) (noting that general assistance and other protective services statutes of some states provide less protection than others).

gle individuals.<sup>26</sup> At the same time, Illinois, Maine, Michigan, Florida and California have thirty-day limits on the provision of emergency housing.<sup>27</sup> New Jersey, on the other hand, has a five-month limit.<sup>28</sup> States also vary in the level of AFDC payments they make available to the poor. Monthly AFDC rents in 1989 ranged from \$118 in Alabama to \$809 in Alaska.<sup>29</sup> Expressed as a percentage of the federal poverty level for three-person families, the AFDC benefits in Alabama are only 15%, and the more generous benefits in Alaska are still only 82.3%.<sup>30</sup> Including food stamps, which most but not all recipients of AFDC receive,<sup>31</sup> benefit payments range from \$354 (45% of poverty level) in Alabama to \$1009 (103% of the poverty level) in Alaska.<sup>32</sup> In Connecticut, the AFDC amount in 1989 was \$649 (82.5% of the poverty level). Including food stamps,<sup>33</sup> the amount was \$773 (98.3% of the poverty level).<sup>34</sup>

### B. *Narrow Interpretations of Constitutions and Statutes*

My second observation is an obvious one, but still worth noting: litigation is limited by both constitutional and statutory language, and by the interpretation of that language by the judiciary. Even favorable statutes are subject to constitutional constraints as interpreted by the courts. In addition, the jurisprudence of the administrative state creates barriers to judicial relief in this area by emphasizing deference to administrative review or judicial reluctance to control or direct governmental behavior for an ex-

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26. P. ROSSI, *DOWN AND OUT IN AMERICA: THE ORIGINS OF HOMELESSNESS* 85 n.4 (1989).

27. See CAL. WELF. & INST. CODE § 11450(f)(2)(A) (Deering 1991); FLA. STAT. § 420.627(4)(d) (Supp. 1991); ILL. REV. STAT. ch. 23, paras. 2212-21 (1989); ME. REV. STAT. ANN. tit. 22, § 8101(2) (1990); MICH. ADMIN. CODE v. 400, 3528 (1979).

28. N.J. ADMIN. CODE tit. 10, § 82-5.10(d)(1)(vii) (1989) (extending emergency assistance from three months to five months if permanent shelter not secured).

29. CHILDREN'S DEFENSE FUND, *SOS AMERICA! A CHILDREN'S DEFENSE BUDGET* (1990) 157, *pertinent part reprinted in Roisman, Establishing a Right to Housing: An Advocate's Guide*, 20 HOUSING L. BULL. 65, 79 (1990) (listing monthly AFDC benefits for a three-person family).

30. *Id.*

31. In 1987, 83.2% of AFDC recipients in Alabama and 67.9% of AFDC recipients in Alaska received food stamps. *Id.*

32. *Id.*

33. In 1987, 75.7% of AFDC recipients in Connecticut received food stamps. *Id.*

34. *Id.*



tended period of time.<sup>35</sup>

Furthermore, the United States Constitution provides little in the way of protection for social and economic rights. Many attempts have been made to apply the equal protection clause of the fourteenth amendment to poverty law issues through litigation, but with little success. Under current Supreme Court doctrine, social welfare laws are examined by the courts under the "mere rationality" test, a test that is very deferential to legislative judgment and action. For example, in *Dandridge v. Williams*<sup>36</sup> the Supreme Court noted: "In the area of economics and social welfare, a State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect. If the classification has some 'reasonable basis,' it does not offend the Constitution simply because the classification 'is not made with mathematical nicety or because in practice it results in some inequality.'"<sup>37</sup> In *Lavine v. Milne*<sup>38</sup> the Court stated that "[w]elfare benefits are not a fundamental right, and neither the State nor Federal Government is under any sort of constitutional obligation to guarantee minimum levels of support."<sup>39</sup> Finally, in *Lindsey v. Normet*,<sup>40</sup> a case that most directly involved the right to housing, the Court stated: "We are unable to perceive . . . any constitutional guarantee of access to dwellings of a particular quality . . . ."<sup>41</sup>

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35. See generally J. HANDLER, SOCIAL MOVEMENTS AND THE LEGAL SYSTEM: A THEORY OF LAW REFORM AND SOCIAL CHANGE 22-25 (1978) (describing courts' reluctance to interfere with agencies' responsibilities of making and implementing policy and the difficulties this creates for social reform groups); Special Project, *The Remedial Process in Institutional Reform Litigation*, 78 COLUM. L. REV. 784, 858-65 (1978) (examining difficulties in devising judicial remedies for institutional reform).

36. 397 U.S. 471 (1970).

37. *Id.* at 485 (quoting *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 78 (1911)). In *Dandridge*, a group of large families and recipients of AFDC benefits challenged the validity of a Maryland regulation that placed a ceiling of \$250 on AFDC grants. *Id.* at 473-75. While the state regulation calculated grants on "standards of need," it placed a ceiling on the amount any one family could receive regardless of the family's size or actual need. *Id.* The Court began its analysis by recognizing that federal law gives the states great latitude in dispensing their welfare funds. *Id.* at 478.

38. 424 U.S. 577 (1976).

39. *Id.* at 584 n.9. Specifically, the Court held that a state statute which establishes a "rebuttable presumption" that anyone who voluntarily terminates her employment and applies for welfare assistance shall be "deemed to have terminated employment for the purpose of qualifying" for welfare benefits does not deny plaintiffs' rights under the fourteenth amendment. *Id.* at 579.

40. 405 U.S. 56 (1972).

41. *Id.* at 74. Appellant challenged an Oregon forcible entry and wrongful detainer statute, that allowed a landlord to bring an action for possession if the

International law provides more economic and social protections—or at least purports to—than the United States Constitution.<sup>42</sup> While the United States has not signed or ratified many of the international agreements and treaties<sup>43</sup> on economic and social rights, it has signed, ratified<sup>44</sup>—and has recently more aggressively used—the United Nations Charter.<sup>45</sup> Article 55 of the Charter states that the United Nations shall promote “higher standards of living, full employment, and conditions of economic and social progress and development.”<sup>46</sup> Article 56 proclaims the obligation of all United Nations members “to take joint and separate action . . . for the achievement of the purposes set forth in Article 55.”<sup>47</sup> The Universal Declaration of Human Rights—a non-binding declaration, but one which some argue has become enforceable as customary international law<sup>48</sup>—states that “[e]veryone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services.”<sup>49</sup>

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rent was over 10 days late. The appellants asserted that the statute was unconstitutional because it did not give them adequate time to prepare for trial and it limited the trial to the issue of whether the tenant had paid rent. The Court decided that the tenant did have adequate time to prepare for trial and that the tenant could institute separate proceedings on issues such as disrepair or substandard conditions of the premises. *Id.* at 64-74. “[T]he Constitution,” the Court explained, “does not provide judicial remedies for every social and economic ill.” *Id.* at 74.

42. See generally Comment, *Human Rights and Basic Human Needs: Using International Human Rights Norms to Inform Constitutional Interpretation*, 34 UCLA L. REV. 1195 (1987) (arguing for applicability of international human rights law to poverty law cases in United States court system).

43. Treaties are generally recognized as the primary source of international law. See L. Henkin, *INTERNATIONAL LAW: CASES AND MATERIALS* 69-71 (2d ed. 1987).

44. The U.S. Constitution does not mention the act of ratification under those sections that concern the treaty making power of the United States. See L. HENKIN, *supra* note 43, at 182 n.1. Under Article II, § 2 of the United States Constitution, the President, “with the advice and consent of the Senate,” has the power to “make treaties.” U.S. CONST. art. II, § 2.

45. The most recent public use by the United States of the United Nations as a legitimizing force in international law and politics has been in the context of the Persian Gulf War. See generally Schachter, *United Nations Law in the Gulf War* 85 AM. J. INT’L L. 452 (1991) (United Nations Charter used as “basis for agreement on aims and means” by states in Persian Gulf War).

46. U.N. CHARTER art. 55.

47. U.N. CHARTER art. 56.

48. See generally L. HENKIN, *supra* note 43, at 986-89 (discussing status of Universal Declaration of Human Rights in international law).

49. *Universal Declaration of Human Rights*, G.A. Res. 217A, U.N. Doc. A/810, art. 25(1) at 140 (1948).

In addition to the United Nations Charter, the United States has also signed the Charter of the Organization of American States.<sup>50</sup> By the terms of this Charter, member states agree to "cooperate with one another to achieve just and decent living conditions for their entire population,"<sup>51</sup> and they further "agree upon the desirability of developing their social legislation" on the basis that "[a]ll human beings . . . have the right to attain material well-being and spiritual growth under circumstances of liberty, dignity, equality of opportunity, and economic security."<sup>52</sup> Significantly, however, although the American Convention on Human Rights created the Inter-American Court of Human Rights,<sup>53</sup> on which court United States nationals can, and do, sit,<sup>54</sup> the United States is not a signatory to the Convention.

Although under the United States Constitution all treaties signed and ratified are "the supreme Law of the Land,"<sup>55</sup> United States courts have narrowed considerably the applicability of these treaties to poverty law and other domestic issues under the "self-executing" treaty doctrine. In brief, the doctrine—based on an 1829 Supreme Court decision<sup>56</sup>—states that United States courts cannot enforce provisions of an international agreement unless they can be applied by the judiciary without congressional implementing legislation.<sup>57</sup> Even if Congress were to pass legislation to "execute" a treaty entered into by the executive branch, the terms of the treaty and the implementing legislation would be subject to all of the restraints on government power imposed by the United States Constitution.<sup>58</sup> In the case of a treaty address-

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50. CHARTER OF THE ORGANIZATION OF AMERICAN STATES, Apr. 30, 1948, 2 U.S.T. 2394, T.I.A.S. No. 2361, 119 U.N.T.S. 3.

51. *Id.* art. 28.

52. *Id.* art. 29(a).

53. American Convention on Human Rights, O.A.S. Official Records OEA/Ser. K/XVI/I.1, doc. 65, rev. 1, corr. 1 Jan. 7, 1970, at ch. VIII, *reprinted in* 9 I.L.M. 673, 690, 65 AM. J. INT'L L. 679, 695 (1971).

54. L. HENKIN, *supra* note 43, at 1034 (describing creation and organization of Inter-American Court of Human Rights, and noting that Thomas Buergenthal of the United States was nominated for court by Costa Rica and served for several years).

55. U.S. CONST. art. IV, § 2.

56. *Foster & Elam v. Neilson*, 27 U.S. (2 Pet.) 253 (1829).

57. For a general discussion of the self-executing treaty doctrine, see L. HENKIN, *supra* note 43 at 198-205.

58. *Reid v. Covert*, 354 U.S. 1, 15-18 (1957). In *Reid*, the Court held that "no agreement with a foreign nation can confer power on the Congress, or any other branch of Government, which is free from the restraints of the Constitution." *Id.* at 16-17. Thus, despite an executive agreement with Great Britain allowing the United States military to try and punish offenses committed by its

ing social and economic issues, current jurisprudence would severely curtail its effectiveness.

### C. *Inability to Provide Long-Term Structural Solutions*

If courts were willing to adopt a more sympathetic interpretation of the equal protection clause, and if they recognized the applicability of relevant international treaties, cases like *Savage v. Aronson* would have an extremely high chance of success. Even if courts were more amenable to such arguments, however, and if, for example, *Savage* had been upheld, my third observation would still apply: litigation is a poor tool for comprehensively addressing broad and complex social issues that require long-term structural solutions.

#### 1. *Problems Facing the Homeless*

One of the problems facing the plaintiffs in *Savage* was, and for many still is, the lack of a stable, well-managed, adequate, and affordable home. As one would expect, the lack of a stable home is one of the primary characteristics defining the class of people known as "the homeless."<sup>59</sup> Although, dividing the poor between "the homeless" and the "not-homeless" has some value, it does little justice to the variety of reasons a person may be homeless, and the variety of problems a person may face as a result of being homeless.

Numerous studies, as well as my experiences in New Haven, indicate that a sizeable percentage of the homeless suffer from

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citizens in Great Britain, the United States could not deprive its civilians of the right to trial by jury and other Bill of Rights protections. *Id.* at 15-18.

59. The definition of "the homeless" or "homelessness" is a matter of some debate. Some definitions include only those people who are literally on the street or in homeless shelters, motels, or hotels. See, e.g., DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, A REPORT OF THE SECRETARY ON THE HOMELESS AND EMERGENCY SHELTERS (1984), reprinted in J. ERICKSON & C. WILHEIM, HOUSING THE HOMELESS 127-28 (1986). Other definitions, such as that of the Stewart B. McKinney Homeless Assistance Act, include all of those who do not have a "fixed, regular, and adequate nighttime residence." 42 U.S.C. § 11302(a) (1988). Peter Rossi makes a useful distinction between those who are "literally homeless" and those who are "precariously housed"; the "literally homeless" have no home to which to go, whereas the "precariously housed" have a tenuous hold on housing of the lowest quality. P. Rossi, *supra* note 26, at 9. Those who are precariously housed are a "step away from" becoming homeless. *Id.* Since to address effectively the problem of homelessness—as distinct from the problems of the homeless—one has to look at both those who are homeless as well as those who may soon become homeless, this paper focuses on both the literally homeless and the precariously housed. For a general discussion of the definitional problem of "homelessness," see *id.* at 8-15.

either some form of substance abuse or mental illness.<sup>60</sup> Even among these people, the level of debilitation varies tremendously. While there is no doubt that some people have become homeless because of such characteristics, the problem of homelessness should not be conflated with the problems of the homeless. While it is beyond the scope of this paper to examine in detail the causes of homelessness, it is essential to understand some of the trends in housing, income, and government assistance that have helped to create and exacerbate the problem of homelessness before discussing the efficacy of proposed solutions.

Over the last decade or so, there has been a decline in housing units with rents affordable to the poorest among us. The Annual Housing Survey of the Bureau of the Census reveals that between 1978 and 1983, twelve large cities in the United States showed a 30% decline in the amount of housing with rents at or below 40% of poverty level income.<sup>61</sup> Of course, this measure of decline assumes that using a "40% of income for rent" test adequately describes housing that is affordable to the poor. Some aid programs use a 25% or 30% income test.<sup>62</sup>

A recent study by Michael Stone of the Economic Policy Institute argues that a percentage of income for rent test does not give an accurate measurement of the number of people who are "shelter poor."<sup>63</sup> He proposes a sliding scale of affordability, which varies with income and household size.<sup>64</sup> His study indi-

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60. See generally HOMES FOR THE HOMELESS: A HANDBOOK FOR ACTION 5-8 (A. Berger, H. Chadosh and R. Slye eds. 1990) [hereinafter HOMES FOR THE HOMELESS] (identifying three frequent problems faced by homeless persons: (1) lack of income adequate to afford housing, (2) mental illness and (3) substance abuse); P. Rossi, *supra* note 26, at 145-57 (reporting that studies indicate that one-fourth of the homeless have been in a psychiatric hospital and one-third suffer from alcoholism).

61. P. Rossi, *supra* note 26, at 182. Declines between 1978 and 1988 ranged from 12% in Baltimore, Maryland to 58% in Anaheim, California. *Id.*

62. Thirty percent of income for rent is the standard measure of affordability used by federal aid programs. See, e.g., Omnibus Reconciliation Act, 42 U.S.C. § 1437a(a)(1) (1988) (using a 30% income test to determine housing affordability for the poor). In the private mortgage sector, banks will usually not allow a mortgage that will result in payments over approximately 33% of a homeowner's income. This is based on lending guidelines of the Federal National Mortgage Association, which are widely adhered to in the banking industry. See Quint, *Groups Seek Low-Income Loan Deal*, N.Y. Times, Oct. 7, 1991, at D1, col. 6.

63. M. Stone, ONE THIRD OF A NATION: A NEW LOOK AT HOUSING AFFORDABILITY IN AMERICA I (1990) (observing that one-third of households in United States are "shelter poor"—meaning they cannot sufficiently meet their non-shelter needs after paying rent).

64. For an explanation of Stone's methodology, see *id.* at 50-57.

cates that many low-income people who pay *less* than 25% of their income still suffer from "shelter poverty."<sup>65</sup> For example, a family of four earning \$10,000 a year may not be able to afford a rent that is even 10% of its income and still pay for other necessities like food and clothing. Similarly, Stone finds that many middle-income households who are paying more than 25% or 30% of their income are not "shelter poor."<sup>66</sup> A family earning \$70,000 a year, for example, can easily pay more than 30% of its income for rent and survive. Using this "sliding scale" measure of affordability, Stone concludes that there has been a 42% increase in the number of shelter poor households in the United States from 1970 to 1987.<sup>67</sup>

At the same time that housing costs have increased for the poorest among us, wages available at the bottom of the market have barely kept pace with inflation, and in some cases have declined in real dollars. This has been particularly true for workers under the age of thirty-five, whose earnings have declined 20% in real dollars from 1968 to 1984.<sup>68</sup> In addition, many of the new jobs which have been created pay wages well below the poverty rate for families.<sup>69</sup>

Kevin Phillips has recently shown that there has been not only a decline in low-income family earnings, but also a tremendous increase in the income being amassed at the top end of the income distribution.<sup>70</sup> Not only are the poor becoming poorer, but the rich are becoming richer. As a result, the gap between the rich and the poor has increased tremendously in the last ten years. For example, the average family income of the poorest 10% of the population declined 14.8% in constant dollars from

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65. M. STONE, *supra* note 63, at 4-5.

66. *Id.*

67. *Id.* at 1. While Stone's measure of affordability does not show a larger growth in the problem than the conventional measurements do, it does show a much different distribution of the problem. Stone's calculations indicate that there are more low-income households and more large (three persons or more) households that are shelter poor than under the conventional measurement. In addition, there are many small households and moderate-income households that are shelter poor by the conventional measure but not by Stone's sliding scale measure. *Id.* at 6-15.

68. P. ROSSI, *supra* note 26, at 187.

69. K. KARST, *BELONGING TO AMERICA: EQUAL CITIZENSHIP AND THE CONSTITUTION* 131 (1989). "Of the eight million net new jobs created from 1979 to 1984, more than half paid less than \$7000 a year (almost \$4000 below the officially defined poverty level for a family of four)." *Id.* (citation omitted).

70. K. PHILLIPS, *THE POLITICS OF RICH AND POOR: WEALTH AND THE AMERICAN ELECTORATE IN THE REAGAN AFTERMATH* 17 (1990) (comparing income gains and losses among various income groups between 1977 and 1988).

1977 to 1988. During the same period, the income of the wealthiest 10% of the population *increased* by 16.5%, and the income of the wealthiest 1% increased by 49.8%.<sup>71</sup>

Income support payments at the federal level also have declined in real dollars. For example, the average monthly payment nationwide under the AFDC program in 1985 dollars decreased from \$520 in 1968 to \$325 in 1985, a decline of 63%.<sup>72</sup> By way of contrast, Social Security payments have remained relatively constant and have even increased in some cases. Social Security old age payments showed the most dramatic increase from 1968 to 1984 of 162%.<sup>73</sup>

The combination of a decline in housing units at the low end of the market with a decrease in income and government assistance has resulted in more of the poor living on the edge of homelessness.

While there is strong evidence for the structural causes of the problem of homelessness, it is important to underscore some of the severe social problems that many of the homeless face.<sup>74</sup> While national figures are unreliable, studies indicate that approximately 70-80% of homeless individuals suffer from some form of substance abuse, mental illness, or both.<sup>75</sup> The percentages for homeless families are lower. Peter Rossi found that in Chicago the homeless had significantly higher levels of depression and demoralization than the remainder of the population,<sup>76</sup> and were more likely to suffer from mental illness coupled with psychosis—i.e. “disturbances in thought and perception that impair one’s contact with reality.”<sup>77</sup> Anecdotal evidence in New Ha-

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71. *Id.*

72. P. Rossi, *supra* note 26, at 191.

73. *Id.* at 190-91.

74. Due to crowded and unsanitary conditions in homeless shelters, one of the problems facing the homeless is a great need for special medical attention. For a more detailed discussion of these special medical needs, see Bass, Brennan, Mehta & Kodzis, *Pediatric Problems in a Suburban Shelter for Homeless Families*, 85 PEDIATRICS 33, 33-38 (1990). For further discussion of medical and other needs of the homeless, see P. Rossi, *supra* note 26, at 143-79 (discussing the homeless and incidence of mental illness, substance abuse, criminal convictions, physical health problems and the breakdown of family and other social networks); Greer, *Medical Problems of the Homeless: Consequences of Lack of Social Policy—A Local Approach*, 45 U. MIAMI L. REV. 407, 411-16 (1990-1991) (noting that infectious diseases, such as pulmonary tuberculosis, occur at alarming rates among the homeless).

75. See INSTITUTE OF MEDICINE COMMITTEE ON HEALTH CARE FOR HOMELESS PEOPLE, HOMELESSNESS, HEALTH, AND HUMAN NEEDS 50, 54-57 (1988).

76. P. Rossi, *supra* note 26, at 149.

77. *Id.* at 152-53. Symptoms of psychosis include paranoid delusions, audi-

ven confirms these observations.

Many of the homeless thus require more than just a "roof over their heads." Some require a highly dependent living arrangement, while others need low-level or occasional support services.<sup>78</sup> At the same time, many, like most of those already housed, would benefit from a housing situation where residents play a more active role in managing and controlling their living environment than is usually the case in rental housing.<sup>79</sup> In response to this need, numerous experiments with ownership models that give more control to residents have been conducted throughout the country.<sup>80</sup>

## 2. *Inability of Litigation to Address the Problems of the Homeless*

The variety of needs exhibited by different homeless persons requires a broad response that incorporates everything from housing production and income supplements to substance abuse programs and effective and democratic housing management. As early as 1972, two clinical law professors, Leroy Clark and Steven Leleiko, argued that, because of its primarily defensive or reactive nature, "litigation conducted within a legislative framework devised without the poor in mind will yield limited results."<sup>81</sup> The ability of a litigation strategy to address or redress a problem is limited in part by the constitutional and statutory framework

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tory and visual distortions and severely irrational reasoning. According to one study, homeless people tend to have more than one symptom and psychotic behavior tends to be "more prevalent and more severe" than in the rest of the population. *Id.* (citation omitted).

78. For one discussion of this type of housing, see Bassuk, *Redefining Transitional Housing for Homeless Families*, 6 YALE L. & POL'Y REV. 309 (1988). Support services needed by many homeless include crisis intervention, child care, psychological counseling, special education and job training. These services could help "formerly homeless families . . . maintain their homes during difficult times." *Id.* at 310-11.

79. For an example of tenant participation in building management, see the discussion of HOME, Inc. in HOMES FOR THE HOMELESS, *supra* note 60, at 10-12, 133-34 (tenants may participate in handling complaint procedures and selection of new tenants).

80. For example, the Neighborhood Reinvestment Corporation, a Congressionally chartered and funded non-profit corporation, has recently established a number of mutual housing associations throughout the United States. While definitions vary, mutual housing basically provides an ownership structure where the resident enjoys many of the control aspects of an "owner," but only enjoys the financial windfall of property appreciation indirectly through the association. Although mutual housing may be a novel concept in the United States, it has existed in Europe for over 100 years. For further discussion of mutual housing, see *infra* note 109 and accompanying text.

81. Clark and Leleiko, *House Counsel for the Poor—An Experiment in Clinical Legal Education*, 17 HOW. L.J. 614, 616 (1972).



within which it operates.<sup>82</sup>

Even within a favorable legislative and constitutional framework, the essence of litigation dictates a narrow focus: a particular statute or constitutional doctrine is invoked to redress a particular injury to a specific client or class of clients. Litigation is usually reactive. It reacts to the cry of a plaintiff, and responds to that cry based at least as much on "the law" as on the cry itself. Moreover, litigation deals primarily with the breakdown of human relations.<sup>83</sup>

For the individual plaintiff, and for similarly situated plaintiffs, lawsuits can be crucial. Litigation, however, at least as it has traditionally been conceived, is not designed to address broad social problems such as homelessness, or to implement or even propose long-term policy prescriptions.<sup>84</sup> Its utility as a tool to address immediate and narrow injustices makes it less useful for producing and implementing long-term constructive policies and strategies to address broad problems like homelessness.<sup>85</sup> In *Sav-*

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82. See *supra* notes 35-41 and accompanying text.

83. See D. LOUISELL, G. HAZARD & C. TAIT, *CASES AND MATERIALS AN PLEADING AND PROCEDURE: STATE AND FEDERAL* 155 (5th ed. 1983) ("Litigation is the last resort, short of violence, in the resolution of disputes."). But see Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1282-84 (1976) (description of "traditional lawsuit" as "retrospective" and "self-contained" and different from new "public law litigation" in which the trial judge "has increasingly become creator and manager of complex forms of ongoing reliefs").

For a discussion of the narrow and technical characteristics of litigation in the context of desegregation, see G. ORFIELD, *MUST WE BUS?: SEGREGATED SCHOOLS AND NATIONAL POLICY* 2, 11 (1978).

84. But see Blasi, *Litigation Strategies for Addressing Bureaucratic Disentitlement*, in *THE RIGHTS OF THE HOMELESS* 1988, at 285 (1988) (limits of litigation in addressing broad structural issues due in part to "bureaucratic disentitlement" and an exclusionary and inefficient welfare process, not because courts are ill-equipped or because litigation is inherently inadequate).

85. For a discussion of the tensions between litigative advocacy and social policy within the context of the problem of homelessness, see Wizner, *Homelessness: Advocacy and Social Policy*, 45 U. MIAMI L. REV. 387 (1990-1991) (discussing problems that result from expansion of the use of litigation from resolution of primarily discrete private matters to broad social issues affecting many people).

Robert Mnookin takes a critical view of the legitimacy and capacity of courts to make policy decisions in the context of child advocacy litigation. Mnookin, *Introduction*, in *IN THE INTEREST OF CHILDREN: ADVOCACY, LAW REFORM, AND PUBLIC POLICY* 25-26 (R. Mnookin ed. 1985). However, while he finds courts lacking in both capacity and legitimacy, he does not completely abandon litigation as a preferred tool for change in this area. He finds that the United States Supreme Court in *Bellotti v. Baird*, 443 U.S. 622 (1979), is more thoughtful in its policy formulation and analysis than the legislature. Mnookin, *Bellotti v. Baird: A Hard Case*, in *id.* at 264. The Court in *Bellotti* invalidated a state statute requiring parental consent before an unmarried minor woman may have an abortion. 443 U.S. at 651. However, the Court devised a compromise in its efforts to protect the family and also protect individual rights. The Court decided that if a state

age, for example, the suit was dictated by an immediate crisis: the potential eviction of over 100 families from emergency housing. It did not even purport to address the variety of needs presented by the heterogeneous group we call "the homeless," or the numerous structural conditions that contribute to the phenomenon of homelessness.<sup>86</sup>

Even with the most sympathetic and intelligent judge, courts are constrained by the specific parties and facts before them. Only those situations where a party decides to litigate make their way into the judicial system. Once a conflict becomes "a case," the facts themselves are constrained by the rules of procedure and evidence. The judicial remedy is limited by the legal duty that the plaintiff claims was breached. While all of this may produce desirable results for the parties immediately before the court, the decision may be inappropriate for addressing other similar situations:

Because courts respond only to the cases that come their way, they make general law from what may be very special situations. Courts see the tip of the iceberg as well the bottom of the barrel. The law they may make may be law for the worst case or for the best, but it is not necessarily law for the mean or modal case.<sup>87</sup>

Of course, "test," or law reform, suits have been brought and, in some cases, won. The most well-known and well-cited example is *Brown v. Board of Education*.<sup>88</sup> While *Brown* is obviously an important and even critical case in the history of the civil rights

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required parental consent, it must also provide another method by which a minor woman can obtain authorization for an abortion. *Id.* at 642-44. For example, a pregnant minor is entitled to a court proceeding to prove that she is mature enough to make her own decisions. *Id.* at 643.

Of course, the efficacy of a particular litigation strategy relies in part on the sympathy of the judges who hear the cases. Paul Dimond discusses the dominant attitude of the United States Supreme Court in segregation cases after *Brown v. Board of Education*, 347 U.S. 483 (1954), as focusing narrowly on "wrongdoing by particular local officials, viewed in isolation from the historic context of any larger wrong," so that remedies are "carefully tailored to do no more than overcome the incremental effects of a particular defendant's specific wrong." P. DIMOND, *BEYOND BUSING: INSIDE THE CHALLENGE TO URBAN SEGREGATION* 395 (1985).

86. For a discussion of *Savage v. Aronson*, see *supra* notes 10-22 and accompanying text.

87. D. HOROWITZ, *THE COURTS AND SOCIAL POLICY* 44 (1977), quoted in Mnookin, *Defining the Questions*, in *IN THE INTEREST OF CHILDREN: ADVOCACY, LAW REFORM, AND PUBLIC POLICY* 62 (R. Mnookin ed. 1985).

88. 347 U.S. 483 (1954).

movement in this country, it too highlights the limits of litigation. Today, almost forty years after the original decision, the United States school system is still highly segregated.<sup>89</sup>

Skepticism about the utility of litigation in addressing social problems like segregation or homelessness is not new. For example, in discussing efforts to desegregate cities in the northern United States, Ramsey Clark observed, "[t]his process of litigation is too slow and feeble to achieve the rights we need. . . . I think we are going to have to rely on courts to the maximum extent that they can be effective, but I don't think they can do ten percent of the job."<sup>90</sup>

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89. See, e.g., R. WOLTERS, *THE BURDEN OF BROWN: THIRTY YEARS OF SCHOOL DESEGREGATION* (1984) (failure of integration to occur to date in four of five school districts that were the subject of *Brown* litigation); De Witt, *The Nation's Schools Learn a 4th R: Resegregation*, N.Y. Times, Jan. 19, 1992, at E5, col. 1 (noting increase in school segregation).

There is a rich body of literature addressing the effectiveness of law and litigation in altering patterns of social behavior and basic beliefs, assumptions, and actions. See generally R. COTTERRELL, *THE SOCIOLOGY OF LAW: AN INTRODUCTION* 48-72 (1984) (summarizing literature on the use of law as a vehicle for social change). Even more so than the example of *Brown*, the experience of the U.S. in the 1920s and 1930s with the prohibition of alcohol underscores the importance of the non-legal context in making a law effective. *Id.* at 59-61. While several factors led to the repeal of prohibition, most important "were the social forces ranged against the law." *Id.*

90. *Equal Education Opportunity: Hearing Before the Senate Select Comm. on Equal Education Opportunity*, 91st Cong., 2d Sess. 1613-14 (1970) (testimony of Ramsey Clark, Attorney General), quoted in G. ORFIELD, *MUST WE BUS?: SEGREGATED SCHOOLS AND NATIONAL POLICY* 323 (1978). One of the most fundamental problems facing a strategy of litigation is the inability to directly affect non-parties. This problem occurs not only because of jurisdictional doctrines, but also because of the enforcement limitations faced by government in general and the judiciary in particular. Raymond Wolters observed this in the context of the school desegregation cases:

Sensing the possibility of achieving racial balance by judicial decree, many liberals endorsed the concept of government by an unelected judicial elite. At the same time, many parents of ordinary means found liberal social engineering so distasteful that they made an alliance with traditional vested interests. The liberals won most of the court cases, but [mostly white, wealthy] parents resisted judicial reconstruction by moving to the suburbs, by retreating to private schools, and by becoming part of a new conservative coalition that now threatens to curb the federal courts.

R. WOLTERS, *THE BURDEN OF BROWN: THIRTY YEARS OF SCHOOL DESEGREGATION* 7 (1984).

The various political realities of legislative and judicial decisionmaking, and their respective strengths and weaknesses, have informed some of the most fundamental debates raised by the practice of judicial review of legislative and electoral decisions. See, e.g., A. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* (2d ed. 1986) (discussing "counter-majoritarian difficulty" of judicial review); Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 YALE L.J. 1013 (1984) (challenging Bickel's counter-majoritarian indictment of judicial review); Eule, *Judicial Review of Direct Democ-*

The same observations can be made about the New York homelessness cases and similar cases throughout the country: In spite of litigation, and in spite of some victories, the larger problem persists.<sup>91</sup> For example, on its face, *Savage* was brought to force the government to expend more money on the ill-conceived policy of housing families in expensive welfare motels<sup>92</sup>—a policy that most people, including the homeless themselves, agree perpetuates homelessness and in many cases increases the problems faced by the homeless. This recognition of the limits of litigation is somewhat tempered by my fourth observation: litigation occurs within a particular context, and must be evaluated within that context.

#### D. *Constraints of Political, Economic and Social Context*

*Savage* was not conceived within a political or policy vacuum. As noted earlier, attempts had been made for over a year to convince the state of the absurdity of its motel policy. It was only after these efforts had failed that litigation commenced. Within the context of a political debate, litigation provides to the plaintiffs—in this case the poor and homeless—an effective and articulate voice for their demands. By imposing a large cost on government, as *Savage* threatened to do, litigation can create political and economic incentives for public agencies to find cheaper and more effective long-term policy solutions.

Similarly, the political context is important in evaluating the *Brown v. Board of Education*<sup>93</sup> cases. While the schools are still highly segregated, it would be naive to look at *Brown I* and *Brown II* solely as cases about integrating the public schools. *Brown I*

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racy, 99 YALE L.J. 1503 (1990) (discussing undemocratic or counter-majoritarian nature of judicial review within context of direct expressions of electoral will, such as referendums and plebiscites).

91. After over a dozen years of litigation, beginning with *Callahan v. Carey*, No. 42582/79 (N.Y. Sup. Ct. Dec. 5, 1979), reprinted in N.Y.L.J., Dec. 11, 1979, at 10, col. 4 (establishing a right to shelter in New York for homeless men) and including most recently *Jiggets v. Grinker*, 75 N.Y.2d 411, 553 N.E.2d 570, 554 N.Y.S.2d 92 (1990) (finding that state law requires New York to provide public assistance shelter allowances that are “reasonably related” to actual housing costs), the problem of homelessness is as pressing as ever. For a discussion of the continued problems facing the homeless in New York, see *supra* notes 1-4 and accompanying text. Of course, this is not to say that these cases and others won in New York and across the country have not been important victories for the homeless, but rather that litigation is generally an ill-designed tool for addressing and combatting the social phenomenon of homelessness.

92. See *supra* notes 10-17 and accompanying text.

93. *Brown v. Board of Education*, 347 U.S. 483 (1954) [*Brown I*]; *Brown v. Board of Education*, 349 U.S. 294 (1955) [*Brown II*].

articulated a right, a normative statement about equality in this country, that had an enormous political impact.<sup>94</sup> While it is clear that the civil rights movement would have occurred without *Brown I*, it is not evident what form that movement would have taken. Nine of the most powerful white men in the United States unanimously declared that separate was *not* equal, at least in the area of education. It was *Brown II*, decided a year later, and the effort to implement *Brown I*'s charge to desegregate that faced the most formidable barriers. While the right was articulated without much compromise, its implementation and thus its effectiveness became hostage to political reality.<sup>95</sup> *Brown I* created a space, however, within which the civil rights movement could challenge the political norms of the time, resulting, for example, in the Civil Rights Act of 1964,<sup>96</sup> which expanded the doctrine of desegregation to *all* federally funded programs.

*Savage*, of course, was more modest in its breadth than the *Brown* cases, focusing on a particular subset of a disenfranchised class: AFDC families in Connecticut. In the end, unfortunately, *Savage* was lost at the Connecticut Supreme Court, and thus failed to provide a normative statement around which a broader movement could rally. In the short term, however, *Savage* did achieve its goal of convincing the State not only to provide shelter to the homeless, but also to place more of an emphasis on stable, adequate, and affordable housing through an increase in rental assistance vouchers available state-wide.<sup>97</sup>

#### IV. COMMUNITY INSTITUTION BUILDING

By focusing on the context of litigation, one begins to see the importance of what I call Community Institution Building. Recognition of the importance of the political, economic and social context for legal strategy—and for addressing problems of pov-

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94. See, e.g., R. WEISBROT, FREEDOM BOUND: A HISTORY OF AMERICA'S CIVIL RIGHTS MOVEMENT 11-18 (1990).

95. See, e.g., *id.* at 12. One example of the political difficulties in implementing *Brown* is the clash between state and federal forces at Little Rock, Arkansas. *Id.* President Eisenhower was forced to federalize the National Guard and send part of the 101st Airborne division to override Governor Faubus's attempt to keep black children out of a public school. *Id.*; see also R. KLUGER, SIMPLE JUSTICE: A HISTORY OF BROWN V. BOARD OF EDUCATION AND AMERICA'S STRUGGLE FOR EQUALITY (1976) (describing effects of political climate on Civil Rights movement).

96. 42 U.S.C. § 2000d (1988).

97. For a discussion of *Savage v. Aronson*, see *supra* notes 10-22 and accompanying text.

erty and homelessness—is by no means new. In the 1960s and 1970s, people like Edgar and Jean Cahn wrote prolifically about the importance of community organizing for any sustained effort to address the problems of poverty.<sup>98</sup> Indeed, political theorists and activists historically have spoken about the importance of collective institutions in designing and implementing a vision of the good and the just. The legal profession, however, at times focuses on technical legal doctrines in its efforts to address social problems, instead of adopting a broader community strategy that focuses on long-term policy goals and—maybe more importantly—that empowers the disenfranchised themselves to address the problem.<sup>99</sup>

One of the most important things that the poor and the homeless lack is institutions that stabilize their community by providing opportunities for participation, control and mutual benefit. In attempting to create such institutions, a Community Institution Building strategy imposes a different role on a lawyer than a litigation-dominated one. During litigation, the lawyer is the primary strategist—choosing the means to reach an end that is usually, although not always, chosen by the client. The lawyer is licensed by society to be the mediator between the client and the court. It is the court that grants or denies relief, and it is the attorney who, on behalf of a client, enters into a dialogue with the court. Clients are thus dependent on the legal profession for asserting and establishing their rights.

By contrast, Community Institution Building creates opportunities for “clients”—i.e. the poor—by creating community insti-

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98. See, e.g., Cahn & Cahn, *The War on Poverty: A Civilian Perspective*, 73 YALE L.J. 1317 (1964) (asserting that “[n]othing less than a concerted, comprehensive attack on the sources of poverty holds any promise of significant success” and that questions such as how to provide medical care, food, jobs, education and social services should all be addressed); Cahn & Cahn, *What Price Justice: The Civilian Perspective Revisited*, 41 NOTRE DAME LAW. 927 (1966) (observing that while “neighborhood law firms” and other community organizations have made important improvements in condition of the poor, inherent deficiencies in cumbersome, costly legal system limit effectiveness of litigation); Cahn & Cahn, *Citizen Participation*, in CITIZEN PARTICIPATION: A CASE BOOK IN DEMOCRACY 7-8 (1969) (although citizen participation in poverty program has risks, its various values outweigh risks); Cahn & Cahn, *Power to the People or the Profession?—The Public Interest in Public Interest Law*, 79 YALE L.J. 1005, 1008-1010 (1970) (asserting that the need for community legal efforts comes in part from the breakdown of traditional legal institutions).

99. See Cahn & Cahn, *Power to the People or the Profession?—The Public Interest in Public Interest Law*, 79 YALE L.J. 1005, 1012-14 (1970) (legal services attorneys are sacrificing quality for quantity by giving maximum resources to cater to their clients’ present needs, instead of investing time in activities that will secure the clients’ future interests).

tutions within which they can assert their own rights and thereby exercise greater control over their own lives. In the words of Jean and Edgar Cahn, "[t]his is the 'corporate' or 'constitutional' function through which lawyers historically have made their most distinctive contributions: shaping the basic ground rules within which human beings would be free to create, to participate and contribute without continued dependence on the legal profession."<sup>100</sup> Rather than focusing on the breakdown of human relations as is generally the case with litigation, the lawyer in the Community Institution Building model plays a role similar to that of the traditional business lawyer—helping clients, usually organizations, "to structure and maintain mutually beneficial . . . relationships."<sup>101</sup>

Community Institution Building not only demands a different role for the lawyer, it also draws upon skills different from those used in litigation and from those used by most poverty lawyers. As suggested by Jean and Edgar Cahn, the skills required are those that have been used most frequently in the private corporate sector. Thus, corporate, tax, real estate, and even securities law become important in the creation and maintenance of community institutions—albeit with a change in focus from primarily for-profit corporations to non-profit corporations. The lawyer uses counselling and advising skills, rather than advocacy skills, and facilitates the creation of new institutions that serve, and are served by, the communities within which they emerge. Thus, the attorney uses these skills to help create viable spaces for the poor and homeless.

Some examples from my experiences in New Haven help to illustrate the operation of this form of lawyering. The organizations described below were, and in most cases still are, clients of the Workshop on Shelter for the Homeless at the Yale Legal Services Organization (the Workshop). The Workshop is an interdisciplinary clinical class consisting of law, business, architecture, and at times public health students who provide legal, technical, management, and design services to non-profit corporations who have as their beneficiaries the homeless and near homeless.<sup>102</sup>

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100. *Id.* at 1024.

101. Staff of the National Economic Development and Law Center & Little, *Practicing Community Corporate Law*, 23 CLEARINGHOUSE REV. 889 (1989).

102. For a discussion of the origins and activities of the Workshop on Shelter for the Homeless at the Yale Legal Services Organization, see HOMES FOR

The Workshop's first client was HOME, Inc., a non-profit manager and developer of low-income housing in New Haven.<sup>103</sup> HOME was created by a diverse coalition of people and organizations within New Haven who were increasingly alarmed by the growth in the number of homeless people and the lack of adequate shelter to house them. The coalition ranged from private real estate attorneys and developers to poverty lawyers and social workers to homeless mothers. The Workshop provided most of the legal, financial, and management advice required to create a permanent institution from this coalition.

The organizers of HOME agreed that one of the major factors contributing to the lack of adequate and affordable housing for the poor was the lack of effective management—management both of the physical space (plumbing, heat, electricity) and of the residents (social services, grievance procedures, eviction policies) in low-income housing. Most organizations—whether non-profit or for-profit—that manage and develop low-income housing are susceptible to the lure of development, so that in most cases excess revenues and capital are used for new development projects rather than for increasing resident services or lowering residents' costs. HOME decided to address this issue by emphasizing management, and asked the Workshop to incorporate this emphasis into the corporate structure of the organization. The Workshop was able to achieve this goal by creating three corporations with interlocking boards of directors: HOME, Inc.; HOME Management; and HOME Development. The boards were created in such a way that the majority of the directors of the parent, HOME, Inc., were elected from those persons responsible for management—the directors of HOME Management. HOME currently manages thirty-two of its own units and an additional 200 units that range from low-income cooperatives to rental projects. HOME has begun to implement a more tenant-based form of management in each of the projects it manages.

In addition to providing innovative management to residents, HOME has begun to develop its own housing with the help of the Workshop. In order to finance a recent development project, HOME plans to apply for low-income housing tax credits,<sup>104</sup>

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THE HOMELESS, *supra* note 60; Arbogast, Barnett, Slye & Treiger, — How. L.J. — (1991).

103. For a detailed discussion of HOME, Inc., see HOMES FOR THE HOMELESS, *supra* note 60, at 10-14, 133-34.

104. The low-income housing tax credit is one of the few remaining tax shelter investments allowed after the passage of the 1986 Tax Reform Act. The



which it will then syndicate to raise equity for the project.<sup>105</sup> Such an endeavor requires a sophisticated knowledge of corporate, tax, partnership and securities law. With the assistance of pro-bono attorneys from private law firms, the Workshop is providing most of the legal and technical assistance for this development project.<sup>106</sup>

While HOME operates primarily within the urban environment of New Haven, the Workshop also represents a nonprofit manager and developer of low-income housing in one of the more wealthy suburbs of New Haven. The Branford Interfaith Housing Corporation (BRIC) was created by a number of churches that, having provided a soup kitchen for homeless and impoverished persons, wanted to expand their activities to include the development and management of low-income housing. The Workshop provided all of the legal and technical assistance required to create BRIC, and has continued as both general counsel and primary staff since its incorporation. BRIC recently completed a twenty-nine unit complex that houses "very low-income people"—i.e., people earning less than fifty percent of area median income. BRIC primarily takes families residing in the local welfare motels, and it encourages, to the extent feasible, resident input and participation in management. All of the legal and financial work for this project was provided by the Workshop—from option agreements and purchase contracts, to bridge and permanent financing and accompanying documents, to zoning approvals and local tax abatements. The result is that rents for three bedroom apartments are as low as \$275.

In addition to representing organizations that emphasize ten-

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credit, which can be found in § 42 of the Internal Revenue Code of 1986, provides tax credits to private investors who invest in projects with at least twenty-percent of their residents being low-income for a period of at least thirty years. I.R.C. § 42 (1990). At least ten percent of the credit is reserved for projects sponsored by nonprofits. For a general description of the tax credit, see Stearns, *The Low-Income Housing Tax Credit: A Poor Solution to the Housing Crisis*, 6 YALE L. & POL'Y REV. 203 (1987); HOMES FOR THE HOMELESS, *supra* note 60, at 105-10.

105. Even with the subsidy provided by the tax credit and the gift of land (which is the case here), subsidized loans are needed to make the units rent at levels affordable to low and very low-income people. In this case, HOME is applying for a subsidized mortgage under the Affordable Housing Program of the Federal Home Loan Bank of Boston, established as part of the "savings and loan bail-out bill." Federal Home Loan Bank Act, 12 U.S.C.A. § 1430(j) (West Supp. 1991).

106. For further discussion of the Workshop on Shelter for the Homeless at the Yale Legal Services Organization and of HOME Inc., see HOMES FOR THE HOMELESS, *supra* note 60.

ant involvement in rental projects, the Workshop represents a number of organizations that provide housing with both the resident control aspects of home ownership and the affordability of rental housing. The Greater New Haven Community Land Trust consists of a broad cross-section of people from the New Haven area who, with help from the Workshop and the Institute for Community Economics, have incorporated a land trust in New Haven. A land trust owns land which it leases to other individuals or organizations, who in turn may develop or take ownership of a building or buildings on the land. A land trust preserves the affordability of housing through resale price controls incorporated in the lease between the land trust and the owner.<sup>107</sup> Thus, the land trust provides many of the attributes of home ownership, including some capital appreciation, while providing a mechanism to keep the housing permanently affordable. The Workshop has been involved in the land trust since its formation, providing legal and technical assistance in incorporating, fundraising, property acquisition, financing and outreach.<sup>108</sup>

The Mutual Housing Association of New Haven is based on an idea similar to the land trust, in that it also provides a mechanism for greater resident control than traditional rental projects, while ensuring that the housing remains permanently affordable. The Mutual Housing Association of New Haven is being developed and organized by the Neighborhood Reinvestment Corporation (NRC), a congressionally chartered, tax exempt, non-profit corporation.<sup>109</sup> Under the NRC model of mutual housing, a cor-

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107. The resale value can be calculated using a number of formulas. Generally, the formula is constructed in such a way that the owner of the building will recoup the value of any improvements that the owner undertook on the property, and a small amount of capital appreciation. By limiting the resale value in this way, the land trust recaptures any increase in value of the land and building resulting from general social and economic conditions, and then passes on that value to the next owner in the form of a below market lease payment. For further discussion of land trusts, *see generally*, INSTITUTE FOR COMMUNITY ECONOMICS, THE COMMUNITY LAND TRUST HANDBOOK (1982) (explaining workings of community land trust model and citing examples of where model is being used).

108. The land trust wanted its decisionmaking processes to be by consensus, where possible, so the Workshop drafted bylaws that balanced this emphasis on consensus decisionmaking with the administrative needs of running an organization. The Workshop also drafted legislation at the state level to provide a safe harbor for land trusts in Connecticut from the effects of the common law property rule of "restraints on alienation" and the "rule against perpetuities." CONN. GEN. STAT. §§ 47-300 to -304 (1990).

109. The NRC was established in 1978, 42 U.S.C. § 8102 (1988), and is most well known for its network of Neighborhood Housing Services organizations. These organizations consist of partnerships of neighborhood residents,

porate entity (the mutual housing association) owns the housing. Members of the association consist of current and potential residents (from a waiting list), representatives of municipal and state government, and leaders from businesses, corporations and the broader community. The board of directors is elected from the membership, and a majority of the directors are residents or potential residents. Thus, ownership and control reside with those who have the most to benefit from the housing. Unlike the land trust model, residents pay a membership fee to the association which is used to create an operating reserve and to finance future development. While the residents receive their membership fee when they leave the association, they do not directly share in the appreciation of the property. Unlike the other organizations discussed above, the Mutual Housing Association is not incorporated and its policies are not set until potential residents are identified and brought into the process. Currently, the NRC organizer in New Haven has begun an eighteen-month organizing effort to involve as many relevant community interests in the organization and development process—including, most importantly, future residents. The Workshop is providing preliminary legal and organizational assistance to the association during this organizational stage.

While the Workshop's involvement in all of the above projects has been comprehensive—from the early stages of incorporation to sophisticated development projects—the Workshop has also been able to provide assistance to well-established community institutions. One of the Workshop's clients, for example, is a church in one of the poorest neighborhoods in New Haven that wants to create a social services outreach center for the surrounding community. The Varick A.M.E. Zion Church, one of the oldest African-American churches in New Haven, contacted the Workshop for technical assistance in financing the purchase of, and renovation of, the building that would serve as the outreach center. The church also requested assistance in renting the facility to social service agencies that would both serve the surrounding community and cover the expenses incurred in owning

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business leaders and local government officials. For the last decade, NRC has studied the mutual housing model in Europe (where it is widely used) and has begun to implement pilot mutual housing programs in select cities across the country. In 1990, NRC decided to choose six new cities to begin mutual housing associations. At the request of the Workshop on Shelter for the Homeless, HOME, Inc., and the City of New Haven, NRC chose New Haven as one of those six cities. For further discussions of the purpose and procedures of the NRC, see 42 U.S.C. §§ 8101-8107 (1988).

and operating the building. The Workshop worked with a committee comprised of representatives from parishioners, the city, and various social service agencies to create a viable program. Some of the proposed tenants for the building include a child day-care center, a youth and family counselling service center, a soup kitchen and a food pantry.

#### V. CONCLUSION

The projects discussed above are small—a few units here, a few there—and they take a long time to come to fruition. For example, the BRIC project began in 1988 and was not completed until May, 1991. *Savage*, on the other hand, immediately affected 136 families and, as more people reached the 100-day limit, could have affected hundreds more. *Savage*, taken in context, played an important short-term role in addressing the problem of homelessness by putting pressure on an existing state institution to become more responsive to the needs of its constituents by making greater use of rental assistance. The above examples of Community Institution Building, on the other hand, have resulted in new institutions for the poor and the homeless that, hopefully, will be more willing and able to involve and provide for them. One further hopes that these new institutions and the process that made them possible, in the long run, will make it more likely that the poor and the homeless—and more importantly their children—will lead stable, healthy and productive lives.

